



U.S. Department of
Transportation

Office of the Secretary
of Transportation

ORDER

DOT 4400.2D

9-9-88

Subject: PERFORMANCE OF COMMERCIAL ACTIVITIES

1. PURPOSE. This Order provides Department-wide instructions for implementing Executive Order No. 12615, Performance of Commercial Activities, dated November 19, 1987, hereafter the Executive Order; the Office of Management and Budget (OMB) Circular A-76, Performance of Commercial Activities, dated August 4, 1983, hereafter the OMB Circular; and the Supplement to the OMB Circular, hereafter the OMB Supplement. These instructions will assure that appropriate products and services needed by the Department are being obtained most economically.
2. CANCELLATION. DOT 4400.2C, Performance of Commercial Activities, dated 2-24-84.
3. REFERENCES.
 - a. Executive Order No. 12615, "Performance of Commercial Activities," dated November 19, 1987.
 - b. OMB Circular A-76, "Performance of Commercial Activities," dated August 4, 1983.
 - c. Supplement to OMB Circular A-76 Parts I-IV, dated August 1983.
 - d. OMB Circular A-76, Transmittal Memoranda No. 1-7 (No. 7 dated August 8, 1988).
4. BACKGROUND.
 - a. The OMB Circular establishes the policy that the Government will rely on private sources to supply the products and services it needs whenever it is economical to do so. The Supplement to the OMB Circular provides procedures, including cost comparison procedures, for determining whether commercial activities should be performed under contract by a commercial source or in-house using Government facilities and personnel. These techniques also provide an excellent mechanism for improving productivity.
 - b. The key elements of the A-76 process include:
 - (1) Inventory Lists of commercial activities.
 - (2) Notification to all directly affected and interested parties of inventory lists, schedules of reviews and decisions resulting from cost comparisons.

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- (3) Management Efficiency Studies conducted prior to a cost comparison of an existing in-house activity to determine the most efficient and effective organization for performance of the activity.
 - (4) Performance Work Statements to be used in preparing cost estimates of in-house performance and in obtaining bids or proposals from private industry to establish commercial source prices. Focus should be on "essential" elements, eliminating unnecessary functions.
 - (5) Reviews of activities on the inventory lists, including cost comparisons of in-house and commercial source performance to determine:
 - (a) if existing in-house activities should be converted to contract;
 - (b) if existing contracted activities should be converted to in-house performance when it appears that contractor prices would be unreasonable; and
 - (c) if new requirements or proposed expansions of existing in-house activities should be performed by contract or in-house.
 - (6) Decisions to convert existing in-house commercial activities directly to contract without a formal cost comparison in limited circumstances and where the basis for conversion can be documented in terms of economy to the Government, furtherance of preferential procurement programs, or furtherance of the mission objectives of the agency.
 - (7) Appeals Procedures by which directly affected parties may appeal cost comparison decisions.
- c. For the purposes of this Order, a commercial activity, as defined in the OMB Circular, is one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source. A commercial activity is not a Governmental function. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

5. POLICY. Experience has shown that the A-76 program is an effective management tool that provides opportunities to reduce the costs and increase the efficiency of operations. Therefore, it is the Department's policy that Secretarial Officers and Heads of Operating Administrations shall incorporate the requirements of the A-76 program into their resource management effort.
6. RESPONSIBILITIES.
 - a. The Assistant Secretary for Administration shall:
 - (1) Establish implementation policy for the A-76 program.
 - (2) Evaluate the implementation and effectiveness of the program.
 - (3) Provide program guidance to the Secretarial Officers and Heads of Operating Administrations.
 - (4) Be the central point of contact with OMB, other Government agencies, and the private sector in providing information and reports on inventories, review schedules, results of cost comparisons and cost comparison data for completed studies.
 - (5) Be responsible for implementing the program in the Office of the Secretary (OST).
 - b. The Director, Office of Management Planning (M-20), will provide the necessary program support to carry out the responsibilities of the Assistant Secretary for Administration.
 - c. Secretarial Officers and Heads of Operating Administrations shall:
 - (1) Designate an official to have responsibility for implementation of the OMB Circular. This official shall be at the Deputy Assistant Secretary level in OST and the Associate Administrator level in the Operating Administrations (Resource Director/Comptroller for the U.S. Coast Guard (USCG)).
 - (2) Establish a central point of contact to carry out implementation and to work with the Office of the Assistant Secretary for Administration.

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- (3) Issue the minimum internal instructions necessary for implementing the provisions of this Order, the Executive Order and the OMB Circular.
- (4) Compile and maintain inventories of commercial activities, expansions and new requirements.
- (5) Prepare schedules for conducting A-76 reviews of all activities listed in the inventories.
- (6) Conduct the necessary A-76 reviews, including cost comparisons.
- (7) Notify affected employees and their representatives, as early as possible, of an impending review and keep them informed of its progress.
- (8) Conduct the appeals procedure to resolve questions from directly affected parties relating to review decisions.
- (9) Exert maximum effort to find suitable employment for any displaced employee including participation in the DOT Priority Placement Program.
- (10) Prepare quarterly reports on implementation of the OMB Circular in accordance with paragraph 8 of this Order. Provide interim reports and other information as required by the Assistant Secretary for Administration.

7. PROCEDURES.

a. Inventory Lists and Review Schedules

- (1) Secretarial Officers and Heads of Operating Administrations shall:
 - (a) Reexamine their operations and functions to assure that their inventory list of existing in-house commercial activities is current and complete, and prepare an updated inventory, using the guidelines in the OMB Circular.
 - (b) Establish review schedules for each of the activities in the updated inventory. Activities added to the inventory list shall be reviewed within two years from the time they are added to the list.

- (c) Prepare an inventory list of new requirements and expansions. This inventory shall identify activities that have been funded and activities for which funds have been requested from Congress. Review schedules shall be provided for those new requirements and expansions that have already been funded. Schedules should be set to match the budget cycle and coordinated with the appropriate budget office.
 - (2) Commercial activities which may not be competed with the private sector (i.e., where legislative restrictions exist or where there have been exemptions for any reason) will be included on the inventory list and scheduled for management efficiency study.
 - (3) Updated inventories of in-house commercial activities, new requirements and expansions shall be submitted to the Assistant Secretary for Administration. These inventories shall be updated annually and submitted not later than April 29 each year.
 - (4) The Assistant Secretary for Administration shall prepare a consolidated Department-wide review schedule of cost comparisons for submission to OMB. OMB will publish a Government-wide consolidated schedule annually in the Commerce Business Daily and the Federal Register for the information of prospective contractors, all potentially affected employees and their representative organizations and other interested parties.
 - (5) When a cost comparison schedule is changed, or if a new schedule is established for an activity not previously reported, the schedule shall be submitted to the Assistant Secretary for Administration 60 days before the review is to start. This will allow sufficient time for OMB notification.
- b. Approval and Coordination of Reviews, Including Cost Comparisons.
- (1) General. Decisions resulting from reviews, including cost comparisons, shall be approved by senior officials. In the Operating Administrations, these officials shall be appointed by the Associate Administrator (Resource Director/Comptroller for USCG) responsible for implementing the A-76 program. The Deputy Assistant Secretary for Administration shall be the approving official in OST.

- (2) Scheduling Cost Comparisons for Existing Contracted Activities, New Requirements and Expansions. A cost comparison of an existing contracted commercial activity, a new requirement or an expansion shall not be scheduled without prior coordination with the Director, Office of Acquisition and Grant Management (M-60).
- (a) Existing Contracts. Commercial activities performed under contract will normally continue unless there is reason to believe that prices have become unreasonable. If commercial prices are considered unreasonable, a written explanation must be provided to justify a cost comparison.
- (b) New Requirements. A newly established need for a commercial product or service should normally be performed by contract, unless it meets the following criteria for in-house performance:
- 1 national defense;
 - 2 no commercial source available;
 - 3 program disruption; or
 - 4 there is reason to believe that commercial prices may be unreasonable. In this case, an informal cost review must be conducted. If this informal review shows that it is likely that the cost to perform the work in-house would be less than the cost of contract performance, then a full cost study is required.
- (c) Expansions. In cases where expansion of a Government commercial activity is anticipated, a cost study of the entire activity, including the proposed expansion, is required. No investments in these facilities and equipment should be made prior to conducting such a cost study. Such an investment would presume the facilities could be used as Government-owned contractor operated facilities, without a thorough investigation of the potential contractors' in-house capacity to perform the required work. Exceptions should be well

documented and approved by the Associate Administrator (Resource Director/Comptroller for USCG) responsible for implementing the A-76 program.

(3) Budget Considerations.

- (a) Cost comparisons of existing contracts, new requirements and expansions must be planned and conducted in coordination with the annual budget review to assure that the necessary resources will be available when needed to implement review decisions. When a review cannot be completed prior to an upcoming budget submission, budgeting should be for the alternative which is likely to be less costly, subject to adjustment after the analysis is completed.
- (b) Conversion to in-house performance from an existing contract, a new requirement or expansion may also require substantial new investment by the Government in facilities and equipment. All preliminary or full cost studies must include, in the in-house cost estimate, the computed cost of capital on those additional and currently owned assets which would be used solely by the in-house operation and which would not be provided to a contractor (see Part IV of the OMB Supplement, page IV-44).

c. Decision to Perform an Activity In-house Because No Satisfactory Source Available or Program Disruption.

- (1) Decisions to continue to perform a commercial activity in-house because no commercial source is capable of providing the needed product or service must be coordinated with the Director, Office of Acquisition and Grant Management (M-60). A written justification showing the effort made to find commercial sources and the specifications and requirements in the solicitation must be submitted (see paragraph 8.a.(1) of the OMB Circular).
- (2) Decisions to continue to perform a commercial activity in-house because use of a contract would cause unacceptable delay or disruption of an essential

program, must be approved by the Associate Administrator (Resource Director/Comptroller for USCG) responsible for implementing the A-76 program or a designee. In addition, the decision must be coordinated with the Assistant Secretary for Administration. A written explanation must be provided to the Assistant Secretary showing the specific impact of using a commercial source on the mission in terms of cost and performance. In OST the Deputy Assistant Secretary for Administration will approve such decisions.

d. Management Efficiency Studies (Certification of Most Efficient and Effective Organization).

- (1) The Associate Administrator (Resource Director/Comptroller for USCG) responsible for implementing the A-76 program, or a designated senior official, shall certify prior to the pricing out of the in-house cost estimate, that the in-house cost estimate will be based on the most efficient and cost effective operation practicable. In OST the Deputy Assistant Secretary for Administration will make the certification.
- (2) The performance of management efficiency studies shall be assigned to or coordinated with existing management analysis organizations. Operating Administrations may contact M-20 for assistance in conducting management efficiency studies (see Part III, of the OMB Supplement).

e. Converting In-House Commercial Activities To Contract.

(1) Cost Studies.

- (a) Estimates of in-house and contractor costs for the commercial activity must be included for every review. Part IV of the OMB Supplement for the cost comparison process must be followed except that conversions without formal cost comparisons may be made where:
 - 1 the conversion is made to a non-competitive source under a preferential procurement program;
 - 2 ten or fewer full-time equivalents (FTE's) are involved; or

- 3 the cost comparison is waived by the official responsible for the A-76 program (Part I, Chapter 2, paragraph A, of the OMB Supplement).
- (b) However, when formal cost comparisons are not made, estimated current in-house cost and contract price must be subjected to an informal cost comparison. The estimated in-house cost for an informal comparison can be based upon available data and management judgments rather than the formal comparison process of Part IV of the OMB Supplement. The documentation need not be lengthy, but should be sufficient to explain to directly affected employees why the activity was converted to contract without a formal cost comparison.
 - (c) Contract conversions as a result of informal comparisons must be at contract prices that are less than the estimated current in-house cost. When contract prices exceed the estimate of current in-house cost, the Contracting Officer shall cancel the solicitation and a formal cost comparison shall be conducted.
 - (d) For formal cost comparisons, the current cost of in-house performance may be used only if the current organization is certified as the most efficient.
- (2) If the contract prices are to be obtained by competitive negotiation or sealed bids, the informal cost comparison method shall not be used unless there is substantial evidence that a competitive market for the service exists and that contract prices will be less than the estimated current in-house cost. Each synopsis and solicitation issued under the informal cost comparison method will include a notice that the solicitation may not culminate in a contract award when all offers from responsible contractors exceed the estimated in-house cost.
- (3) Plans to convert in-house activities to contract or to contract for an expansion under a preferential procurement program, with an informal cost comparison, shall be coordinated with the Associate Administrator (Resource Director/Comptroller for USCG) responsible for implementing the A-76 program, or a designated senior official.

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f. Independent Review.

- (1) Operating Administrations shall assign organizations with accounting or financial management capability the responsibility for conducting the independent reviews of cost comparisons (see Part I, Chapter 2, paragraph 4 of the OMB Supplement). In OST, the Director, Office of Financial Management (M-80), shall have this responsibility. Operating Administrations may contact M-80 for advice in conducting independent reviews.
- (2) The independent review should be of those costs which can be determined prior to bid opening, including costs to the Government in the event of contract performance. This shall be done prior to submitting the cost comparison form and supporting data to the contracting officer. Up to 30 calendar days may be allowed for conducting the independent review. Elements of the cost comparison form calculated after bid opening, which are not based on standard cost factors, should also be subject to an independent review.

g. Inflation Guidance. This is provided periodically from OMB. See Transmittal Memorandum No. 6, dated March 4, 1988, for guidance through 1993.

h. Standard Cost Factors. Standard cost factors shall be used as prescribed in Part IV to the OMB Supplement, the "Cost Comparison Handbook" and as supplemented by Secretarial Officers and Heads of Operating Administrations for particular operations. Any variations in the use of standard cost factors from one cost comparison case to another must be fully explained in writing, and included in the cost comparison documentation and approved by the Associate Administrator (Resource Director/Comptroller for USCG) responsible for implementing the A-76 program, or a designated senior official. The Director, Office of Acquisition and Grant Management (M-60), will approve such variations in cost factors for studies conducted in OST.

i. Procurement Procedures For Commercial Activities. Procurement procedures for commercial activities are contained in the Federal Acquisition Regulation (FAR), Subpart 7.3 - Contractor versus Government Performance. Section 7.305 states those solicitation provisions which must be included: FAR 52.207-1, Notice of Cost Comparison (Sealed Bid); or FAR 52.207-2, Notice of Cost

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Comparison (Negotiated), and FAR 52.207-3, Right of First Refusal of Employment. It should be noted that Federal Acquisition Change (FAC) 84-25 (July 1, 1987) requires that the Right of First Refusal clause be included in all solicitations covering work currently being performed by the Government and in all contracts that result from the solicitations whether or not a cost comparison was performed. The Transportation Acquisition Regulation (TAR), section 1207.3, supplements the FAR on this subject and requires the use of these additional solicitation provisions in certain situations: TAR 1252.207-70, Implementation of Right of First Refusal of Employment, and TAR 1252.207-71, Financial and Technical Ability. The FAR Council is currently considering cases on these issues and may eventually include similar provisions in the FAR, in which case the TAR provisions would be superseded.

j. Relationship To The Budget.

- (1) In general, the performance work statement standards, workload estimates and resulting cost estimates must be consistent with Department budget guidance covering the period of performance. This ensures that economic assumptions and guidance developed for the Department are used when developing the cost study. Cost estimates for expansions or conversions of existing contracts to in-house performance must also be prepared in accordance with budget guidance. This may require additional work since these options may not be in the Department's projected budget. The budget implications must also be considered for the overhead organizations. The key consideration is whether the budgets of these organizations would be revised if the mode of operation of the function under study is changed.
- (2) Dollar and personnel savings associated with projected cost comparison decisions must be clearly identified in budget estimates transmitted to the Office of the Secretary, in accordance with guidance issued by the Assistant Secretary for Budget and Programs.

8. REPORTING REQUIREMENTS. Secretarial Officers and Heads of Operating Administrations shall submit to the Assistant Secretary for Administration quarterly reports on the progress of implementing the Executive Order, in accordance with instructions for the A-76 management information system provided by OMB.

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These reports shall be submitted by December 10, March 10, June 10 and September 10. The Assistant Secretary for Administration will prepare consolidated reports for the Department for submission to OMB.

9. APPEAL PROCEDURE.

a. Purpose.

- (1) The appeal procedure provides an opportunity for directly affected parties to review the basis for decisions (a) resulting from cost comparisons performed under the OMB Circular and Part IV of the OMB Supplement and (b) to convert an in-house commercial activity to contract performance with an informal cost comparison in accordance with criteria in paragraph 7.e.(1) of this Order. The procedure also permits directly affected parties to submit questions on these decisions for fair and impartial adjudication.
- (2) The appeal procedure does not apply to questions concerning award to one contractor in preference to another; or to Government management decisions, including decisions made as a result of management efficiency studies.
- (3) The appeal procedure must be independent and objective and provide the appellant with a reply within 30 calendar days of receipt of the appeal. When more than one appeal is received, the replies to the appellant may be provided within 30 days from the end of the appeal period.

b. Definition. Directly affected parties are Federal employees and their representative organizations impacted by a cost comparison decision or a decision to convert to contract with an informal cost comparison; and the bidders and offerers on the solicitation issued in connection with a cost comparison.

c. Request from Affected Parties for Documentation Supporting Cost Comparison Decisions. All documentation supporting the decision shall be made available to directly affected parties upon request when the initial decision is announced. If the documentation is not available at that time, the appeal period shall be extended the number of days equal to the delay.

- (1) If the decision is to contract out, the details and documentation shall include the in-house cost estimate with the detailed supporting data, the completed cost comparison form and the name of the successful bidder or offeror.
 - (2) If the decision is to perform in-house, the details and documentation shall include the in-house cost estimate with the detailed supporting data, the completed cost comparison form and the price of the bidder whose proposal would have been most advantageous to the Government.
- d. Eligible Appeals. To be considered eligible for review, appeals must:
- (1) Be received in writing within 15 working days after the date the supporting documentation is made available to the directly affected party. Mailed appeals must be postmarked no later than the last day of the appeal period to be eligible for consideration. The appeal period may be extended by the contracting officer to a maximum of 30 working days if the cost comparison is particularly complex.
 - (2) Address specific line items on the Cost Comparison Form (Part IV) or specific points in the explanation for converting to contract and set forth the rationale for questioning those items.
 - (3) Demonstrate that the result of the appeal may change the decision.
- e. Appeals Official.
- (1) The appeals official shall be at a higher organizational level than the official who approved the cost comparison decision being appealed.
 - (2) Departmental elements shall designate appeals officials at appropriate organizational levels. In OST, the appeals official shall be the Assistant Secretary for Administration.
- f. Nature of the review. The appeals official shall:
- (1) Conduct an independent and objective review of the decision and the written appeal received from affected parties.

- (2) Provide the directly affected parties that submitted appeals with an opportunity for an oral presentation for the purpose of elaborating on the issues contained in the written appeal.
 - (3) Resolve the appeal questions fairly and equitably with regard to all directly affected parties.
- g. Review of the Appeal. In making a determination, the appeals official shall:
- (1) Review all the material upon which the decision was made including the cost comparison documentation, solicitation requesting contractor bids, statement of work and any other related documents or explanations.
 - (2) Review the reasons given by the directly affected party in the appeals letter for questioning the results of the decision.
 - (3) Review any additional written material supporting the appeal that has been submitted by the affected party during the appeal period.
 - (4) Consider the directly affected party's oral presentation of appeal questions previously submitted in writing.
 - (5) Obtain and review the Government's position on the appeal questions from the organization that conducted the cost comparison or prepared the explanation for converting to contract.
 - (6) Consider any further information which in the discretion of the appeals official is obtained by request, investigation or research in order to conduct a fair and full review of the appeal questions.
 - (7) Prepare findings for each of the appeal questions.
- h. Final Determination.
- (1) The appeals official shall deliver a written reply to the official who approved the decision package. The written reply shall include, but need not be limited to:

- (a) The appeals official's final determination on the appeal.
 - (b) The facts and findings for each of the appeal questions upon which the final determination is based, including any pertinent explanation or rationale for the final determination.
 - (c) The relief, if any, to which the directly affected party is entitled and directions on how such relief is to be accomplished.
- (2) When the appeals official is unable to make a final determination based on the facts and findings for each of the appeal questions, the facts and findings shall be delivered to the official who approved the decision package. The approving official shall revise the decision package to comply with the appeal official's findings for each of the appeal questions, and shall make the final determination.
 - (3) The decision of the appeals official shall be final, and there shall be no further appeal outside the Department, nor any judicial review.
 - (4) The appellants shall be notified of the final determination, and shall be provided with the revised decision package and the appeal official's findings.
- i. As soon as an appeal is received in OST, a copy should be sent to the Office of Management Planning (M-20).

FOR THE SECRETARY OF TRANSPORTATION:



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